Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1995

Bernard Giffler,

Petitioner,

v.

Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charled D Baker, Donna Faunce, Patricia A Cheney, Carl F Haeusssler, Geryl d McMullin, Eric M Raffle, Elizabeth A Yonson,

Respondents.

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

* * *

Bernard Giffler (Pro se)
34 Linda Lane
Warrington PA 18976
215/343-0194

30 pp

QUESTION PRESENTED FOR REVIEW

Did the U.S. District Court err in granting respondents a summary dismissal on the merits of subject case when there remain substantial issues of material fact? To be more specific, did the U.S. District Court err in granting respondents' MOTION FOR SUMMARY JUDGMENT in the face of petitioner's objections that respondents' 'facts of subject litigation' were grossly falsified to make the petitioner out to be an uncaring person who was inundating his school administration's fax machine with his faxed messages so the Administration could not use their fax machine for the alleged more important business for which Mr Abel, presumably speaking for the Administration, says it had been purchased.

And also in the face of petitioner's objection that lying representations in respondents' MOTION FOR SUMMARY JUDGMENT may have prejudiced the District Court to wrongly interpret precedent cases so it could argue in its OPINION that the veracity of respondents' 'facts of subject litigation' were immaterial - despite the evidence in the District Court's OPINION that it clearly believed respondents' version of the contested facts was the correct version - without having seen the petitioner or given him any opportunity to question respondents and others with respect to the veracity of respondents' alleged facts. And also in the face of petitioner's objection that two important precedents in the District Court's OPINION were wrongly construed: namely, PERRY EDUC. ASS'N v. PERRY LOCAL EDUC. ASS'N, 460 U.S. 37, 45 (1983) and DESTINATION VENTURES, LTD. v. FCC, 46 F.3d 54 (9th Cir. 1995).

LIST OF PARTIES

Petitioner, Bernard Giffler, is a resident of the Central Bucks School District in Bucks County, PA. He is 74 plus years of age and currently retired. He has an earned doctoral degree in Engineering Science [Columbia University, 1959], and has worked exclusively on computers and their applications for leading computer manufacturers and users, beginning in 1950.

Respondents are officials of the Central Bucks School District. Gene P Abel is the district's business administrator. N Robert Laws is the school district's superintendent and the person to whom Gene Abel reports.

The remaining respondents are the elected members of the district's school board in 1994. [Messrs Abel and Laws and certain other school administrators are also unelected (and thus non-voting) members of that Board.]

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OPINIONS BELOW

The orders of the U.S. Court of Appeals and the order and opinion of the U.S. District Court are reproduced in the Appendix, beginning at Page A-1.

JURISDICTION

This Court's jurisdiction is invoked pursuant to the fact that all charges in petitioner's civil action in U.S. District Court were dismissed on summary judgment, that petitioner's appeal in the U.S. Court of Appeals for the Third Circuit was similarly dismissed when that Court affirmed the lower court's ruling, and the fact that the Appeals Court did then deny petitioner's request for a rehearing by the Appeals Court en banc on January 4 1996.

This petition is filed within 90 days of the U.S. Court of Appeals' denial of petitioner's request for a rehearing en banc, and an additional 60-day extension by Justice Souter.

Copies of this petition have been sent to Pennsylvania's Attorney General as required by U.S. Supreme Court Rule 29.4(c).

STATUTES INVOLVED

U.S. Constitution: First Amendment on freedom of speech.

U.S. Constitution: Fifth and Fourteenth Amendments on due process.

STATEMENT OF THE CASE

Petitioner brought a civil action against respondents, charging them with directing Gene Abel [or giving him unchecked authority] to direct subject parties' telephone company [Bell Atlantic] to permanently call-block petitioner's phone lines which he had been using for some months to fax his views and opinions to his school board and administration, mainly views and opinions on matters relevant to the regular business of that board and administration.

After about 5 or more months of this, Mr Abel did 'in passing' complain [very falsely in petitioner's view] that petitioner's faxes were disrupting the smooth operation of the administration, that they would, for example, seize the Administration's fax machine for long periods during which the Administration could not use it for presumably more important other business for which it had been exclusively purchased and [quoting Mr Abel] to which it had been duly 'dedicated'.

Gene Abel did subsequently warn petitioner in a letter dated June 30 1994 that his phone lines will be permanently call-blocked if he sends a single fax on any subject to [or via] the school administration's fax machine during the administration's business hours.

Gene Abel did then phone petitioner the next morning [July 1, 1994] before the just-cited letter had even been received, to advise him that he had sent the administration two faxes that very morning and that he was now going to be permanently call-blocked.

Petitioner apologized, saying they were sent by mistake. He apologized because he had informally agreed to honor Abel's demands until such time as he could get a court of law to decide if the Administration can legally dictate when he can and cannot send a fax to or via the administration's fax machine, on pain of being call-blocked if he did not comply.

The cited call-blocking, the Court should know, is a service-for-fee of our telephone company [Bell Atlantic] that will let ANY Pennsylvania telephone subscriber direct Bell Atlantic to call-block ALL incoming calls [telephone or fax] from the phone lines of ANY other Pennsylvania subscriber.

When petitioner was call-blocked, he received no official notice from Bell Atlantic that he was or would be call-blocked. What did happen is that Bell Atlantic would intercept his calls [telephoned or faxed] to the Administration in a switching center and would send the petitioner back a false canned message that the party he called "is not taking calls at this time". A more correct message would have said that his 'call is not being forwarded because the called party has call-blocked the telephone used to make this call'.

Bell Atlantic's service, the Court should know, does not [and presumably can not] currently call-block fax calls without also blocking ordinary voice calls, and vice versa.

The facts are that any Pennsylvanian can call-block any other Pennsylvanian. The blocking party does not need to have a reason. Nor do the blocked lines have to have previously been used to call the blocker, or to be the lines of a person who knows his blocker or

who might have an imagined reason to call him. Nor will the blocking party be told who [i.e. which blocked telephone line] was intercepted on the blocking party's behalf, and when.

Petitioner believes and had complained that the state law that supports this service-for-fee of the telephone company is obviously unconstitutional because it illegally infringes the call-blocked parties' first-amendment right of free speech and their fifth and fourteenth amendment right to due process.

Petitioner did not make the preceding claim explicit in his subject civil action because, being a non-lawyer, he did not know how to do it. He has, however, since made this claim to the PA PUC and is currently bringing a civil action on this issue against Bell Atlantic in the PUC's administrative law court and will, if necessary, move his complaint to the U.S. District Court.

Petitioner would further advise this court that he had been trying to persuade Gene Abel and other parties on his [the petitioner's] faxlist that respondents do not have absolute authority to prescribe who can call or fax whom in a public telecommunications system because the regulation of these systems is typically delegated to authorized regulatory agencies which the school administration is NOT.

Petitioner had also told the School Board and Administration in his faxletters that he was [and still is] willing to self-regulate the sending of his faxes so they would hardly ever conflict with the Administration's use of its fax machine - provided the regulations are reasonable [i.e. mutually acceptable] or court-imposed and that respondents could not threaten

to call-block petitioner's phone lines on their own authority if he did not comply with the administration's dictatorial regulations and its own unsupervised private determinations of how, when and where its regulations were [or might have been] violated.

See, for example, Gene Abel's above-cited letter in Abel's affidavit in DEFENDANTS' MOTION FOR SUMMARY JUDGMENT for other of Abel's viws of the legalities of subject litigation and the abuse that [Abel says] petitioner has inflicted on him - views that are quite different from the account in the main body of Abel's affidavit and in respondents' MOTION itself - particularly Abel's unwillingness in his letter to discuss and resolve subject dispute so that petitioner HAD TO TAKE HIS CASE TO THE U.S. DISTRICT COURT. Petitioner would also direct this Court to the following quotes in Abel's above-cited letter: e.g. "If ... you again fax [any] material during the work day, your [telephone] lines will be PERMANENTLY blocked" and "your [petitioner's] contention that the blocking is illegal does not hold water ... and until such time as either the courts or the legislature has made call-blocking illegal, it is legal" and his closing statement that "this is the last time that I intend to deal with this issue".

And Gene Abel did then call-block petitioner's lines on the morning of July 1 [before his letter had even been received] because [Abel said] the Administration received two faxes from the petitioner that very morning. [Note that Abel did later say in his affidavit that petitioer sent 8 faxes the next day - an allegation the petitioner called a blatant lie [one of many] in his REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and subsequent Brief to the Appeals Court.

Petitioner did subsequently check his fax machine's log to find the faxes which were two. Each was a one page statement that was addressed to a different member of the Board. Each took one minute to transmit after which petitioner's fax machine will normally hang up and wait several minutes before attempting to send a next fax - even to the same fax machine.

Petitioner found they were sent approximately 8:15 AM by accident in that he had thought they would have been received well before the start of the Administration's business hours. He also discovered the Administration's fax machine was not in use when petitioner's messages arrived. That is, petitioner discovered that his modem had to wake-up the Administration's modem.

Petitioner is giving this court this material to contrast with what Gene Abel said in his false version of the facts [in his affidvit in DEFENDANTS' MOTION FOR SUMMARY JUDGMENT], and to emphasize petitioner's claim that Mr Abel's affidavit did not tell thc District Court the whole truth and that his false and misleading statements were made to prejudice the District Court and to incite it to grant respondents' subject MOTION FOR SUMMARY JUDGMENT.

Also note that the Court's decision made it possible for it to declare the contested versions of the facts to be immaterial and to grant respondents' MOTION as a matter of law and to even declare that IT IS THE COURT'S OPINION THAT THE SCHOOL ADMINISTRATION COULD REFUSE TO ACCEPT PETITIONER'S FAXES AT ANY TIME FOR ANY OR NO REASON, that is, that the Administration could treat its fax machine the same as an ordinary office machine [e.g. a pencil sharpener that it could let some persons use - and others, not].

Petitioner subsequently took his case to the U.S. Court of Appeals which affirmed the lower court's order granting summary judgment to respondents on all counts WITHOUT AN ACCOMPANYING OPINION.

When petitioner's request for a rehearing by the entire U.S. Court of Appeals was denied, he then decided to take his case to the Supreme Court.

REASON FOR GRANTING THE WRIT

Certiorari should be granted to review the decision of the District Court and the Court of Appeals because petitioner was denied his day in court which would have given him more opportunity to contest respondents' false statements of the facts of subject case which did most wrongly depict petitioner as an unreasonable trouble-making person who wanted to disrupt the smooth operation of the Administration.

Petitioner believes he could easily have dispelled respondents' demeaning characterization of petitioner's reasonably decent behavior, and the risk that their slurs could have prejudiced the district court to find one way or another to stop petitioner's alleged abuse of his school board and administration - when the facts are that the truly abused party is [and was] the petitioner.

Petitioner further believes the District Court also erred in deciding PERRY v. PERRT supported respondents' position that their fax machine is not a public forum, particularly when it denied petitioner any opportunity to present his analysis of what PERRY did and did not say in a trial or oral argument.

Petitioner further believes the District Court erred when it used the fact that there was just one precedent [DESTINATION VENTURES LTD. v. FCC, 46 F. 3d 54 (9th Cir. 1995] involving persons' first-amendment right to fax unsolicited messages to substantiate its conclusion that fax technology is new and untried with respect to the determination of a fax machine's status as a public forum.

That is, petitioner believes a trial would have produced evidence that could have thwarted the District Court's conclusion that fax technology is so new and different that it would be resolving the issue of the status of unsolicited faxed communications for the first time and that it could do it without giving petitioner a day in court in which he and witnesses could have demonstrated that fax technology is or has become an integral part of telephone technology so that, for example, one cannot currently block fax calls on telephone lines [which is how they are transmitted] without also blocking all ordinary voice calls on those same lines because these calls are intermixed and separated only by their senders' and receivers' privately owned or leased terminals.

Petitioner would thus argue that the District Court did create an improper precedent that nullified a ruling of the FCC that is binding on the transmission of faxed and telephoned communications between states. That is, it created a precedent that can now be used to subject telephoned [fax or voice] intra-state communications to a restriction [namely, the right of any telephone subcriber to authorize his telephone company to block incoming calls from specified intra-state telephone lines for any or no reason] - a restriction which is not applicable when the parties reside in different states.

CONCLUSIONS

Petitioner would request that the Supreme Court terminate the Central Bucks Administration and Board's harassment of petitioner's use of his telephone line to transmit his views with respect to the deliberations of his school Administration and Board by fax machines that are regularly used to send/receive faxed communications to/from these persons.

He would further suggest that recipients, who may truly be harassed by faxed communications, be urged to find a non-coercive solution to their problem - or, failing that, that the harassed party charge his alleged harasser with criminal 'harassment by communication' or that he seek relief by bringing a civil action against his alleged harasser. [Petitioner would further request that the Supreme Court give all persons the right to send unsolicited faxed communications to anyone who can receive them, subject only to reasonable restrictions that the senders not use their first-amendment right of free speech to harrass their messages' intended recipients.

Petitioner would further remind this Court that subject District Court wrote in its OPINION that it was the opinion of the 9th Circuit Court, that heard DESTINATION VENTURES v. FCC, that the FCC's ban was upheld because it satisfied the "reasonable fit requirement the First Amendment imposes on [the] regulation of commercial speech." It did not, in short, deny that the advertiser had a first-amendment right to fax its unsolicited messages which was the unprecedented decision of the District and Appeals Courts in subject litigation in which petitioner was trying to do no more than disseminate his and other similarly minded persons' views of

what their school board and administration should [and *should not*] be doing.

And he would now, the District Court having said that, ask the Supreme Court to note that his District Court did then state that there was no constitutional hindrance if subject school board and administration should deny petitioner the right to fax ANYTHING EVER to his school board and administration.

Petitioner would thus request that the District Court's summary dismissal of his case be vacated and petitioner's original civil complaint be reconsidered on its merits, and that the Supreme Court decide the basic issue of whether a fax machine with a telephone number in a public telecommunications system is or is not a public forum.

Respectfully submitted,

by:

Bernard Giffler {pro se)
34 Linda Lane
Warrington PA 18976
215/343-0194

Dated May 31 1996

APPENDIX TO PETITION FOR CERTIORARI

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Judgment Order

(U.S. Court of Appeals - Third Circuit)

(Issued Jamuary 4 1996)

Bernard Giffler, Appellant v. Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charles D Baker, Patricia A Cheney, Donna L Faunce, Carl F Haeussler, Geryl D McMullin, Eric N Raffle, Elizabeth A Yonson

SUR PETITION FOR REHEARING

BEFORE SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAAD, ALITO, ROTH, LEWIS, McKEE, and SAROKIN, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the court.

Dated: Jan 4 1996

Judgment Order

(U.S. Court of Appeals - Third Circuit)

(Issued November 15 1995)

Bernard Giffler, Appellant v. Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charles D Baker, Patricia A Cheney, Donna L Faunce, Carl F Haeussler, Geryl D McMullin, Eric N Raffle, Elizabeth A Yonson

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On Appeal from the U.S. District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 94-cv-05348)

***

Submitted October 16 1995

BEFORE: STAPLETON, NYGAARD and LEWIS, Circuit Judges

***

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered May 8 1995, be and is hereby affirmed. Costs taxed against appellant.

Dated: November 15 1995

ORDER AND MEMORANDUM GRANTING DEFENDANTS'

MAY 8 1995 MOTION FOR SUMMARY JUDGMENT

(U.S. District Court for the Eastern District of Pennsylvania)

(Entered May 8 1995)

Bernard Giffler, Appellant v. Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charles D Baker, Patricia A Cheney, Donna L Faunce, Carl F Haeussler, Geryl D McMullin, Eric N Raffle, Elizabeth A Yonson

***

(Docket Number 94-cv-05348)

Submitted April 13 1995

BEFORE: VANARTSDALEN, Judge of District Court

***

MEMORANDUM AND ORDER

Plaintiff Bernard Giffler (Giffler) filed this action against school district officials of the Central Bucks school district (District) specifically naming the business administrator, the superintendent of schools, and the nine members of the Central Bucks school district Board of Directors (Board), including the president and vice-president of the Board. The District and the Board are not named as defendant, and the defendants are not named in their official capacities.

Nevertheless, plaintiff seeks mandatory injunctive relief and damages against both the District and the Board for alleged violations of his right of free speech and to due process.

Giffler claims the defendants violated his First Amendment right of free speech and his right to due process by ordering that a "call block" be placed on the single facsimile {fax) machine utilized in the District administrative office. The call block feature prevented facsimile messages sent from plaintiff's listed telephone fax number from being received by the District's fax machine. No other telephone number had a call block placed on it by the District. All defendants have moved for summary judgment, contending there is no First Amendment or other right that would require the District's fax machine to remain available to receive faxed telephone messages from plaintiff's private telephone[1]. Defendants also contend that plaintiff has no due process right to a hearing or judicial determination prior to the District initiating the call block. I agree. The motion for summary judgment will be granted.

I. FACTUAL BACKGROUND

Throughout early 1994 defendant Gene Abel, business

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1. Plaintiff Giffler timely filed a response to the motion for summary judgment. Although this response does not contain any affidavit to counter those submitted by defendants in support of the summary judgment motion, because plaintiff is a 'pro se' litigant, I will consider the information set forth in plaintiff's response to be in the nature of an affidavit.

administrator for the District, warned plaintiff Giffler that Giffler had been sending an excessive number of faxes to the District's administrative office fax machine, interrupting its use for administrative business[2]. Giffler failed to heed Abel's warnings and continued sending faxes. In June of 1994, Abel notified Giffler in writing that if Giffler continued to send faxes during the administrative office's business business hours[3], the District would "call block" faxes[4] originating from the telephone listed in his name. The day after Abel sent this letter, Giffler sent the District faxes after 8:00 a.m. [5]. [Cont'd]

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2. According to the District, Giffler's fax activity in early 1994 was as follows: 106 transmissions in January; 85 in February, 207 in March; 147 in April; 324 in May; and 128 in June. At his deposition, Giffler estimated that the transmissions averaged two pages each.

Giffler's faxes were often in the form of a "newsletter" which he sent to certain District administrators and teachers, as well as to others. This newsletter presented plaintiff's views about issues confronting the District and contained "exposes" of District actions.

3. The District business hours are from 8:00 a.m. to 5:00 p.m.

4. The call block feature prevents calls originating from a particular telephone number from going through to the number of the party ordering the block.

5. There is some dispute as to the number of transmissions Giffler sent the day after Abel sent his letter. The District says Giffler sent eight [Cont'd]

[Cont'd] The District subsequently ordered the call block, which prevented Giffler from making any fax transmission to the District from Giffler's personal fax machine [6].

The block remained in place until mid-August, 1994, when Giffler signed, under protest, a written agreement that he would not send faxes to the District during business hours. The District subsequently lifted the call block. Since the District lifted the block, Giffler has abided by the terms of the agreement, restricting his fax transmission to the District to non-business hours. The District reports, and Giffler does not dispute, that it continues to receive faxes from Giffler, regardless of subject matter, so long as they are not sent during business hours.

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5. [cont'd] transmissions. At his deposition and in his response to defendants' motion for summary judgment, Giffler says he sent two transmissions. Giffler protests that he had not yet received Abel's warning letter when he sent the offending faxes. Giffler admits, however, that he understood the general terms of the warning contained in the letter from discussions with Abel that took place prior to the date of the letter. Plaintiff says he thought the school day began at 8:30 a.m. rather than 8:00 a.m.

6. The block did not prevent all faxes from Giffler, but merely those originating from his own fax machine. Giffler testified at his deposition to sending faxes to the District from other fax machines during the time the call block was in place, as well as to hand-delivering messages during this time.

II. PROCEDURAL HISTORY

Plaintiff filed the complaint in this action on August 29, 1994. In response, the defendants filed a motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12. By Memorandum and Order of December 19, 1994, I granted defendants' motion in part and gave plaintiff leave to file an amended complaint clarifying any due process claim he sought to assert. In response, plaintiff filed an amended complaint claiming that the defendants had violated his due process rights by "their failure to bring a police action or to seek a court order that woud force plaintiff to cease and desist from violating the defendant's [sic] conditions for accessing their faxline" and "their refusal [ ] to submit plaintiff's case and argument [ ] to an adjudicative agency of government that would have jurisdiction to resolve the parties conflicting viewpoints." (Plaintiff Amended Complaint). The defendants then filed the instant motion for summary judgment.

III. THE SUMMARY JUDGMENT STANDARD

A motion for summary judgment is appropriate only when there is no genuine issue of material fact, and one party is entitled to judgment as a matter of law. WILLIAMS v. BOROUGH OF WEST CHESTER, 891, F.2d 458, 463-4 {3d Cir. 1989). In a motion for summary judgment, the court may examine evidence beyond the pleadings. The court must always consider the evidence, and the inferences from it, in the light most favorable to the non-moving party. UNITED STATES v. DIEBOLD, INC., 369 U.S. 654, 655 {1962); TIGG CORP. v. DOW CORNING CORP.,

822 F.2d 358, 361, (3 Cir. 1987); BAKER v. LUKENS STEEL CO., 793 F.2d 509 511 (3d cir. 1986). If a conflict arises between the evidence presented by both sides, the court must always accept as true the allegations of the non-moving party. ANDERSON v.LIBERTY LOBBY, INC., 477 U.S. 242, 255 (1986). For a dispute to be "genuine", a reasonable fact finder must be able to return a verdict (or render a decision) in favor of the non-moving party. ANDERSON, 477 U.S. at 248.

I find that there is no dispute as to any material fact in this matter. Summary judgment is available to the defendants if they are entitled to judgment as a matter of law.

IV. DISCUSSION

A. Plaintiff's First Amendment Claim

Plaintiff Giffler argues that the time restriction that the District has placed on his sending fax transmissions violates his First Amendment free speech rights. He claims that any restriction on his ability to send faxes to the District would be a violation if that restriction is imposed on him alone. In response, the defendants argue that the District's administrative office fax machine is not a public forum and its use, and the messages which it is programmed to receive, may be regulated, limited and controlled in any reasonable manner and without providing any prior notice.

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7. Research produced one case, DESTINATION VENTURES, LTD. v. FCC, 46 F.3d 54 (9th cir. 1995), involving First Amendment rights and fax technology. [cont'd]

The question of First Amendment rights in the use of fax technology appears to have been seldom considered by the federal courts[7]. Although fax machine usage has not been extensively considered, the law of free speech rights and public property is well established.

The Supreme Court has created three classes of publicly held property for First Amendment purposes: public forums, designated public forums, and non-public forums. INT'L SOC'Y FOR KRISHNA CONSCIOUSNESS v. LEE,112 S. Ct. 2701, 2705 (1992). The fax machine is clearly not a public forum. The fax machine is not a place "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." PERRY EDUC. ASS'N, 460 U.S. 37, 45 (1983).[8]

Nor is the fax machine a designated public forum. As defined by the Supreme Court in LEE, a designated public forum is public property that is not a traditional public forum but that "the state has opened for use by part or all of the public" as a place for expressive activity. LEE, at 2705. Attempts to regulate speech in a designated public forum are subject to the same limitations as are regulations of speech in traditional public fora. ID. To create a designa--

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7. [cont'd] In this case the United States Court of Appeals for the ninth Circuit held that an FCC regulation banning unsolicited advertisements from being sent by fax satisfied the "reasonable fit" requirement the First Amendment imposes on [the] regulation of commercial speech. Id. at 55-56.

8. Examples of public fora include streets [cont'd]

ted public forum, the state must act intentionally. CORNELIUS v. NAACP LEGAL DEFENSE AND EDUC. FUND, 473 U.S. 788, 802, (1985).

The District argues strenuously that the fax machine in question is for business use only during business hours. Defendants indicate and Giffler does not dispute, that apart from Giffler's faxes all faxes sent or received on the fax machine at the [Central Bucks] school district administrative offices are related to the day-to-day business of the District. The District can not be said to have intentionally designated the fax machine as a place for expressive activity[9].

Because the fax machine is not a public forum or a designated public forum, it is a non-public forum. A non-public forum is subject to reasonable regula-

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8. [cont'd] and parks. PERRY, at 45. Giffler argues that the application of the three tier forum analysis to fax machines is absurd. It is clear, however, that the right of access is a form of communication and that forum analysis is appropriate. SEE PERRY. at 44 {applying the three tier analysis to a school internal mail system).

9. In PERRY, the Supreme Court faced facts quite analogous to those in the instant dispute. There, the Court held that allowing some non-business use of a school's internal mail system did not create a limited public forum. PERRY, at 47-48. "When government property is not dedicated to open communication, the government may [ ] restrict use to those who participate in the forum's official business." ID, at 53.

tion so long as the regulation is not content-based; that is, so long as the regulation is not used to suppress one speaker's views due to disagreement with their content. LEE, 112 S. Ct. at 2705-06.

Giffler claims that the District imposed the call block and restrictions because of the content of his fax transmissions. According to plaintiff Giffler, his faxes accused District officials of improper behavior in connection with their school board offices and challenged the District's positions on several issues. The uncontroverted evidence, however, is that the District has not refused to accept Giffler's faxes based on the message or content of the transmission. It is indisputed that the District accepted and continues to accept all of plaintiff's faxes - regardless of the nature of their content- sent during non-business hours.

While it is true that Giffler is the only person subject to the hour restrictions and the only person whose fax line was call blocked, he is also the only person who sends non-day-to-day business related faxes to the District administrative office fax machine. So long as the District treats equally all transmissions of a similar nature, there can be no content based restriction of free speech. Faxes sent in the course of day-to-day business to a fax machine designated for business use simply can not be equated with indiscriminate non-business faxes.

The hour restriction currently imposed on Giffler is reasonable[10]. The restriction allows Giffler [Cont'd]

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10. It should be noted that the District could choose to deny all non-day-to-day business related fax trans-

ample opportunity to send faxes to the District during hours other than business hours. The time restriction imposed on Giffler by the District amounts to no more than an inconvenience to Giffler. Even when the call block was in place, Giffler had multiple alternative means of sending communications to the District, including U.S. Mail, personal hand delivery, and even faxing the District from any phone line other than his own. Giffler's own deposition testimony reveals that he has taken advantage of at least some of these alternatives from time to time.

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10. [Cont'd] missions, regardless of when they are sent. The government does not have an obligation to purchase a fax machine and supply it with paper to provide the public a forum in which to promote political or other agendas. Any non-public use the District allows for a business-only fax machine is purely discretionary, subject only to the limit that the District not allow and deny use on the basis of its agreement or disagreement with the message contained in the transmissions.

In the DESTINATION VENTURES case, the Ninth Circuit pointed out that allowing use of a fax machine involves some cost to the recipient of the faxes, for the recipient must pay for the paper on which the message is printed. DESTINATION VENTURES LTD. v. FCC, 46 F.2d 54, 56 (9th Cir. 1995).

Giffler suggests that the District should purchase additional fax machines if his messages are interrupting the business of the District. Clearly there is no First Amendment or other constitutional requirement that a school district purchase and maintain fax machines so that members of the public may send communications to the district by fax instead of by mail or hand delivery or some other method.

I find that the District has not intentionally opened their administrative office fax machine to public discourse. The hour use restriction imposed by the District on Giffler's use of the fax machine is reasonable and is not content-based. The call block imposed by the District on plaintiff Giffler's faxes was reasonable as well. The call block allowed Giffler many alternative means to send communications to the District. Summary Judgment will be granted for the defendants and against plaintiff on Plaintiff's First Amendment claim [11].

B. Plaintiff's Due Process Claim

In his due process claim, Giffler argues that his due process rights were violated when the District instituted the call-block without placing the matter before a court or administrative tribunal. Plaintiff Giffler misconstrues the requirements procedural due process imposes on the state.

The Constitution dictates that no person shall be deprived of life, liberty, or property without due process of law. A life, liberty, or property interest must be implicated before the guarantee of procedural due process attaches. Property interests protected by procedural due process are determined by state law. SEE, E.G. BOARD OF REGENTS v. ROTH, 408 U.S. 564, 576-78 (1972).

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11. Although the question is not presently before me, I add, by way of clarification, that I see no constitutional prohibition against the District imposing a total call block for all hours against messages emanating from Giffler's telephone fax machine.

Plaintiff Giffler's claim does not involve life or liberty interests, nor does Giffler have a property interest in being able to send faxes to the fax machine in the District's administrative office. The machine is used by the District exclusively for business purposes (with the exception of receiving Giffler's faxes). The state can deny public access to a non-public forum such as the fax machine, thereby excluding anyone not involved in official business, so long as the exclusion is not based on whether the state agrees with the content of the message.

Summary judgment will be granted in favor of defendants and against plaintiff Giffler on plaintiff's due process claim.

C. Qualified Immunity

Plaintiff Giffler names as defendants and brings this action only against individuals. The Supreme Court has made clear that government officials who perform discretionary functions related to their positions are shielded from liability for civil damages so long as their conduct does not violate clearly established constitutional or statutory rights. HARLOW v. FITZGERALD, 457 U.S. 800, 818 (1982).

As administrators and officials for the District, the defendants must exercise discretion to ensure that school business is carried out as smoothly and efficiently as possible. Imposing the call block and hour use restrictions was within the scope of the defendants' responsibilities and discretion. Defendants did not violate any of Plaintiff Giffler's

clearly established constitutional or statutory rights by imposing the call block or the hour use restriction. The defendants enjoy qualified immunity from plaintiff Giffler's claims. An appropriate order follows.

ORDER

Upon consideration of the defendants' motion for summary judgment and plaintiff Bernard Giffler's response thereto, for the reasons set forth in the accompanying memorandum it is ORDERED that summary judgment is GRANTED for defendants and against plaintiff.

Judgment is entered in favor of all the named defendants and against the plaintiff, Bernard Giffler, on all claims asserted in plaintiff's complaint and amended complaint.

BY THE COURT:

May 4 1995 Donald W. VanArtsdalen. S.J.

ADVISORY LETTER FROM WILLIAM K SUTER

Office of the Clerk of the U.S. Supreme Court,

dated April 1, 19996

RE: Bernard Giffler v. Gene P Abel, et al. Application No. A-809

Dear Mr Giffler:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter who, on April 1, 1996, extended the time to and including June 2, 1996.

BY: William K Suter, Clerk

NOTIFICATION LIST

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No. 96-134

Supreme Court, U.S.
FILED
AUG 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

BERNARD GIFFLER,

Petitioner,

vs.

GENE P. ABEL, N. ROBERT LAWS, JACQUELINE WOLCHKO, JOHN M. TOTH, CHARLES D. BAKER, PATRICIA A. CHENEY, DONNA L. FAUNCE, CARL F. HAEUSSLER, GERYL D. McMULLIN, ERIC N. RAFFLE and ELIZABETH A. YONSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Perry Educ. Assn. v. Perry Local Educator's Assn., 460 U.S. 37 (1983) 8

United States Constitution Cited:

First Amendment 1, 2, 8

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Federal Rule of Civil Procedure 56 7

Supreme Court Rule 15.1 5

STATEMENT OF THE CASE

This action was brought by petitioner Bernard Giffler ("Giffler") against the business administrator, school superintendent and individual school board members of the Central Bucks School District, Bucks County, Pennsylvania. Giffler is a resident of the district. He sought relief in federal court claiming that his First Amendment right of free expression and his constitutional right to due process were infringed when the business administrator placed a restriction on Giffler's facsimile ("fax") transmissions to the single fax machine installed at the central business office of the school district. This restriction was made due to Giffler's practice of faxing voluminous documents which interfered with the district's conduct of its day-to-day business on the fax machine. Giffler's faxing of non-business messages, which he has described as "political newsletters", was restricted to non-business hours. When he violated the restriction, a "call-block" was put in place which barred any receipt of his fax messages by this single fax machine at the business office. Giffler was advised that this "call block" would be removed if he would agree in writing to transmit his non-business fax messages only during non-business hours. After six weeks he agreed, under protest, and abided by the agreement during the relevant time period thereafter.

Giffler then filed this civil action in federal court. He sought an order barring the district from imposing any restriction on his transmissions to the business office fax machine; further, he requested unspecified damages for the alleged violation of his claimed First Amendment right to have the district accept his messages transmitted to this particular machine whenever he chose, or, at minimum, on terms negotiated with and acceptable to him.

In response to a preliminary motion seeking more

specificity regarding Giffler's claim of denial of due process, the court allowed Giffler to amend his complaint. In the amended complaint Giffler asserted that the officials of the school district should not have been able to impose or enforce their restriction on his use of the business office fax machine unless they first initiated some form of "police action" against him, or sought a "court order" in a judicial proceeding, or submitted the matter to some other "adjudicative agency of government" to resolve his claims.

Giffler's deposition was taken and, thereafter, a motion for summary judgment was filed on behalf of all defendants. The motion was supported by relevant admissions made by Giffler at his deposition along with the sworn affidavit of the district's business administrator (Abel). Giffler's response to the motion consisted solely of a brief in opposition. He had initiated no discovery and offered no formal factual submission to oppose the motion. The district court did accept the factual allegations that were incorporated in his brief as if they constituted an opposing affidavit by him.

The district court concluded that Giffler's response to the motion for summary judgment raised no genuine issue of material fact on any relevant issue. Similar to the approach adopted in the instant petition before this Court, Giffler had argued that the business administrator for the school district had lied to or misled the district court in his affidavit. The district court, in its opinion, explicitly found that on all relevant legal issues there was no genuine dispute of fact. Summary judgment was entered for all defendants.

On the First Amendment claim the court first concluded, as a matter of law, that the district's fax machine was not a "traditional public forum". It was not, for example, a park or other recognized place of public assembly. Likewise, the court

found no ground for any genuine dispute on the issue of whether the school district took any deliberate action to open the use of its business office fax machine for exchange of opinions on non-business matters. To the contrary, with the exception of Giffler's transmissions, message traffic on the machine had been confined to the day-to-day business management of the district.

The district serves approximately 12,500 students. It has over 1,000 employees and more than 16 schools. The fax machine in question, located at the district's administration center, handles message traffic for the numerous departments which conduct the day-to-day business of the district: purchasing, bookkeeping and accounting, human resources/ personnel, public relations, and others. The superintendent of schools and his assistants operate from this office. The fax machine in question, at all relevant times, was the single such machine available in the business office for the immediate exchange of business related documents which needed prompt attention. These documents included, for example, communications with the administrators and teachers of individual schools, other school officials at the local, intermediate and state level, and communications with independent contractors, vendors and bidders regarding construction, maintenance and service contracts.

Under the circumstances, the district court concluded that since the message traffic on the machine had been confined to these sorts of day-to-day business functions, the machine had not been "opened" as a "limited public forum". The court concluded, as a matter of law, that the fax machine should be considered a "non-public forum".

The court then reviewed whether the restriction on Giffler's non-business fax transmissions to times outside regular business hours raised any genuine issue that the school district was

attempting to "suppress" his political views. The court found no factual support for the claim. In order to keep the line open for message traffic related to business, Giffler was advised by the district's business administrator that his messages on this particular machine could be received only before 8:00 a.m. or after 5:00 p.m. on a business day. There was no restriction whatsoever on Giffler's other methods of communicating with the school district or its officials. For example, he could still make regular telephone calls, send correspondence by mail, hand-deliver messages, and continue to attend and speak at regularly scheduled school board meetings which was his regular custom. None of these facts were disputed by Giffler. Save the limited temporal restriction on his use of the business office fax machine, he admitted that all forms of communication between himself and the district, and its officials, were open to him at all relevant times. The court concluded that the district's limited restriction of Giffler's message traffic was reasonable and in no way impermissibly infringed his right of free expression.

As to Giffler's claim that his "due process" rights were denied, the court concluded that he had no recognized life, liberty or property interest in the unrestricted transmission of non-business messages to the district's business office fax machine. As a matter of law, the court rejected Giffler's claim that due process required that the district bring the issue before an independent administrative or judicial tribunal before taking any action to "call block" his transmissions in order to enforce its temporal restriction on transmissions of non-business message traffic by confining such transmissions to non-business hours.

The Third Circuit, without opinion, affirmed the judgment of the district court.

In concluding this outline of relevant facts and proceedings

below, respondent is bound, under Rule 15.1, to make some particular answer to the wide-ranging allegations of petitioner's statement of the case (Petition, pp. 2-7). At no time did the district "permanently" call block transmissions from petitioner's fax machine (Petition, p. 2). When the "call block" was first imposed on Giffler's transmissions, it was made clear to him that it would be lifted if he would simply agree in writing to abide by the restriction which would require him to transmit his non-business "political newsletters" during non-business hours. Six weeks later he agreed to comply, in writing, and the call block was lifted. Thereafter, his non-business messages were received during non-business hours.

At no time was the "importance" of Giffler's messages somehow balanced against the importance of business message traffic (Petition, p. 2). Rather, it was reasonably concluded that the volume of Giffler's non-business message traffic during the business day had become a hinderance that could be reasonably regulated by restricting this message traffic to non-business hours. In that way, both his goals and the goals of the district could be accomplished without interference.

Giffler was advised of the restriction being imposed on his message traffic not only in a letter at the end of June 1994 but, on several prior occasions, he was advised orally of the restriction. He was given substantial notice that he was to restrict his transmissions outside business hours.

When he was advised that he had violated the restriction, and that the call block was being imposed, he may well have viewed his actions as innocent and mistaken. Yet, rather than agree to submit to the reasonable regulation by making a written commitment to do so, he argued that the district should consider alternative sorts of restrictions that might be more acceptable to him (Petition, pp. 2-5). The law does not require such bargaining over the use of an internal business communications device.

Giffler presents an extended discussion of the mechanism of call blocking, as he understands it, and what he believes are inherent improprieties in that system. Yet, he acknowledges that any complaint of his in this regard was not made a subject of the instant action (Petition, pp. 3-4).

Giffler disputes that he sent eight faxed messages to the district's fax receiver on July 1, 1994 in violation of the restriction. He claims that there were only two messages transmitted after the beginning of business hours (8:00 a.m.) and that that occurred by mistake (Petition, pp. 5-6). This is an example of a proposed "factual dispute" which the district court found irrelevant. The court held that since the business fax machine constituted a "non-public forum" the school district had a right to impose reasonable regulations on the use of this business machine as long as those regulations were not used to suppress the views of the sender. Implicitly, the court ruled that issues such as the number of faxes sent during business hours in violation of the regulation was not relevant to a determination of whether free expression rights had been violated. Mistakenly or not, the simple requirements of the limited regulation had not been complied with by Giffler. The limited sanction of call blocking was imposed until he would agree in writing to abide by the requirements of the regulation. In the meantime, and at all relevant times, he was never denied the right to communicate with the district by any other available means and there is no factual dispute that he did use those alternatives (District Court Opinion, pp. A-8 to A-13).

REASONS FOR DENYING THE WRIT

Petitioner's request for a writ of certiorari should be denied because the question presented suggests no special or important reason for granting the writ.

Specifically, this is not a case where the Third Circuit has rendered a decision in conflict with any other United States Court of Appeals, nor has it decided a federal question in a way conflicting with a state court of last resort.

The Third Circuit affirmed the judgment of the district court without deeming it necessary to render any opinion in support of its action. It implicitly found the result reached by the district court to be correct. In so doing, it did not depart in any fashion from the accepted and usual course of judicial proceedings, nor did it sanction any such departure by the district court. Thus, there is no requirement for an exercise of this Court's power of supervision.

Most importantly, the question presented for review by the petitioner does not, in any fashion, present an important question of federal law. Petitioner specifically asks this Court to review the correctness of the district court having granted summary judgment when "there remain substantial issues of material fact". District courts routinely review the factual submissions of the parties in order to determine whether summary judgment is appropriate under Fed. R. Civ. P. 56. A review of the district court's opinion supporting the grant of summary judgment in this case makes clear that the court thoroughly reviewed the opposing factual claims of petitioner, defined the relevant legal issues on his constitutional claims, and found that with regard to the facts specifically relevant to those legal claims, there was no genuine dispute which would render summary judgment inappropriate (A-3 to A-15). Petitioner would propose that this Court comb back over the record to determine whether the district court was in error in finding that no material fact was in genuine dispute. That task has already been accomplished by the Third Circuit. The same issue was raised before the Court of Appeals and petitioner's appeal was rejected. Even if another review were called for by this Court, a finding in petitioner's

favor would provide no precedent of national value or import. Petitioner essentially asks that this Court to reconsider the factual basis for a grant of a motion for summary judgment. By definition, this is not the sort of exercise for which this Court has reserved the important writ of certiorari.

Petitioner elaborates on his "Question Presented" by adding several paragraphs that are more appropriate to his "Statement of the Case". However, in his concluding paragraph expanding on the "question" he suggests that this Court should also consider whether, in ruling on his First Amendment claims, the district court wrongly construed this Court's decision in *Perry Educ. Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37 (1983) and the Ninth Circuit opinion in *Destination Ventures Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995). The district court's citation to the *Destination Ventures* case had nothing to do with its holding in this matter. It was cited simply as the one case which the court's research disclosed which raised considerations of First Amendment rights and fax technology, but in a different factual context from the instant case (commercial speech). Therefore, the district court's reference to that case would give rise to no appealable or reviewable issue in any event.

Petitioner had argued to the Third Circuit that this Court's *Perry* decision was misapplied in the instant case. Again, the Third Circuit dismissed the appeal on all grounds, including that claim of error.

The core of petitioner's complaint, setting factual issues aside, raised the question of whether the school district's single business office fax machine was appropriately categorized as a "non-public forum". This Court has already set forth detailed guidance on how a claimed breach of a First Amendment right should be evaluated in a similar context. The district court in this case specifically cited, and relied upon, this Court's decision in

the *Perry* case and its subsequent decisions in *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788 (1985) and *Krishna Society v. Lee*, 505 U.S. 672 (1992) (A-8 to A-13). The instant matter does not present a case where this Court should address the "non-public forum" issue another time. The law on this issue has been thoroughly discussed in prior decisions. Lower courts have ample guidance on the issue already. The decision made by the district court in this case, and affirmed by the Third Circuit, in no way conflicts with the prior relevant decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny Giffler's petition for a writ of certiorari on the question presented.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(3)

No. 96-134

In The

SUPREME COURT OF THE UNITED STATES

October Term 1995

Bernard Giffler,

Petitioner,

v.

Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charled D Baker, Donna Faunce, Patricia A Cheney, Carl F Haeussler, Geryl D McMullin, Eric M Raffle, Elizabeth A Yonson,

Respondents.

Reply to Respondents' Brief in Oposition to Petioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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United States Constitution Cited

First Amendment 1, 2, 3, 5, 6, 8, 9

OBJECT OF THIS REPLY

This Reply was prepared to rebut respondents' STATEMENT OF THE CASE in their BRIEF IN OPPOSITION - particularly to report and condemn inaccuracies and misrepresentations that [petitioner says] were designed to falsely characterize petitioner as a dangerous lout that was using his alleged first-amendment right of free-speech to disrupt the smooth operation of subject school administration and thus to bring on him the undeserved animus of the district court.

Petitioner makes this rebuttal because he believes it has been respondents' intent [particularly Gene Abel who is the school administration's business administrator] to incite the district court to protect the school administration from the 'lout' by granting respondents' Motion For Summary Judgment as a matter of law despite the fact that respondents and court could not produce a single precedent in which a fax machine [or telephone] in a PUBLIC telecommunications system had ever been ruled to be a non-public forum, and despite the fact that their principal precedent [PERRY v. PERRY] which was used to argue that respondent's fax machine is a non-public forum did not apply in subject litigation because [if it did] we should then have to see no relevant difference between a school administration's INTERNAL mail system and that same administration's PUBLIC fax machine.

Note that petitioner calls every telephone or fax machine, that has an assigned telephone number in a public telecommunications system, a PUBLIC communications device for the reason that any member of the public who has access to such a device may legally dial-up any other such device - the same as any person on a public street may seek to communicate with any other person on that same street.

A R G U M E N T S

BRIEF IN OPPOSITION: PAGE 1, PARAGRAPH 2

The BRIEF says petitioner "claimed [a] First Amendment Right to have [subject school] district accept his messages transmitted to this particular [fax] machine whenever he chose, or, at minimum, on terms negotiated with and acceptable to him."

Petitioner says this and previous characterizations of his claim have been inflammatory and totally false. Petitioner never denied that his first-amendment right could be restricted by mutual consent or by a court of law or by an authorized regulatory agency: e.g. the FCC. Petitioner had further repeatedly argued that respondents could not [by reason of petitioner's claimed first-amendment right] force petitioner on pain of being call-blocked] to accept respondent Abel's unilateral politically inspired restrictions of his right to send faxed communications to school board members and other officials via the administration's fax machine - persons who regularly send/receive unrestricted faxed communications in this manner.

It is also significant that respondents claimed their fax machine was not a public forum for the reason that the administration did not purchase it to be a conduit for the exchange of protected speech or that it be used for any purpose that was not "official business" as defined in Abel's affidavit in respondent's Motion For Summary Judgment. Petitioner says this last claim should be irrelevant because respondents never produced a published notice of their 'official business doctrine' until months after they had call-blocked petitioner's phonelines and which even then was an off-the-cuff pronouncement authored by respondent Gene Abel, and because no one in the administration regularly reads incoming and outgoing faxed communications to determine if they

are 'official business' and to block [i.e. fail to forward] those that are not 'official'.

I [petitioner] should like also to mention that the level of respondents' mischaracterization of my claimed first-amendment right is much reduced in subject BRIEF, compared to their earlier Motion For Summary Judgment and their Brief to the Third Circuit Court of Appeals which said petitioner claimed an absolute first-amendment right to send as many communications as he chose, whenever he chose.

Abel did further wrongly say in his cited affidavit and elsewhere that Giffler [petitioner] sent voluminous quantities of his communications that would tie-up the administration's fax machine for long periods during which the administration could not use their machine for its "dedicated" official business.

These and other of Abel's statements were monstrous lies that should have been examined by a jury. That is, the district court should not have ignored petitioner's charge that they were politically inspired and may also have been a criminal attempt to obstruct justice by demeaning the petitioner and thus inciting the court to find any arguable way to stop petitioner's alleged victimization of his school administration and which may have been a subconscious reason for the court to have wrongly concluded that PERRY supported respondents' argument that THEIR fax machine was not a public forum - essentially for the reason that it had not been purchased to be used as a conduit for the expression of protected speech or for any purpose that was not "official business".

And there is still petitioner's argument that the district court could not cite a single precedent in which the owner of a telephone or fax machine was able to unarguably declare THEIR machine to be a non-public

forum for any reason, leastways to arbitrarily deny people their first-amendment right to dial-up their school administration's telephone or fax machine.

Petitioner would further argue that respondents decision to call-block his telephone lines was part of a specific plan to muzzle residents of his school district who were doing no more than to disseminate their opposition to the school board's 'school building program' that these residents believed was not needed and that was really being pushed to accelerate the residential development of their school district - which they did not want. This was also the position of petitioner who would also like to mention that the board [just before Abel began to concoct his plan to call-block petitioner] voted to eliminate the principal public-input segment of the board's public meetings because dissenting residents were using that means to promote their opposition to the school board's school building program.

It was for the above and other reasons that petitioner has claimed that respondents' decision to call-block the petitioner was politically motivated. That it was, in fact, designed to muzzle the citizenry. [Petitioner argues that the call-blocking is obviously unconstitutional .. that the elimination of public-input segments was probably not unconstitutional but that it could indicate the school board's frame of mind.]

BRIEF: PAGE 2, NEXT-TO-LAST PARAGRAPH

Respondents cite here [from the district court's OPINION] the court's conclusion that "Giffler's response to the motion for summary judgment raised no genuine issue of material fact on any relevant issue" and also that the court found that this conclusion applied to Giffler's argument that respondent Abel's affidavit lied and misled the court. Giffler's response is that the lies and misleading statements were delibe-

rate attempts to incite the court so as to predispose it to believe that petitioner victimizd respondents.

Petitioner would further argue that this inculcated predisposition of the court could account for its too ready willingness to accept respondents' flimsy arguments: e.g. that their fax machine could be self-declared to be a non-public forum [because of respondents' unargued statements that it was not purchased to be a conduit for the expression of protected speech or for any purpose that was not 'official business' - despite the fact there was no program in place to preread incoming and outgoing faxed communications to determine if they were [or were not] official and despite the fact that there was no precedent in which a public communications device had ever been found to be a non-public forum - self-declared, or not.

BRIEF IN OPPOSITION: PAGE 2, LAST PARAGRAPH

Petitioner believes the district court was in error in concluding that precedents [e.g. PERRY v. PERRY] were sufficient for it to uphold respondents' claim that their fax machine was not a public forum because of respondents' unargued claim that Giffler was the only person that did not use the administration's fax machine for whatever Abel might say after the fact is official business, and despite the fact that Giffler's faxes' recipients did never object to him [or anyone else, apparently] that his faxes violated the administration's 'official business doctrine'.

Petitioner would also add that he would have no complaint if the administration [or any organization that receives mail or faxes for employees or affiliates, preread them to determine if they were 'official business' and would refuse to forward those that were not. [The reader should understand that NO ONE CAN CALL-BLOCK MESSAGES AND READ THEM, TOO!]

BRIEF IN OPPOSITION: PAGE 3, FIRST PARAGRAPH

This paragraph, which was apparently excerpted from respondents' Motion for Summary Judgment and maybe other of respondents' briefs, tells all concerned that the subject school district has 12,500 students, over a 1000 employees and more than 16 schools. Its purpose was obviously to impress the district court with the probable volume of its faxed communications and its alleged consequent need to be certain that its "single" fax machine be kept open for the administration's important business communications.

Petitioner recalls responding that the administration's fax-load is remarkably light despite the number of its employees and schools, that he could tell because of the relatively small percentage of the times his faxed communications to the administration's machine could not be received because the machine was 'busy'. Petitioner further recalls suggesting that the administration buy a second fax machine if its current single machine is truly as busy as it says [because these machines can be very inexpensive.]

But what is interesting is the court's and respondents' reaction to this 'suggestion'. They agreed, for example, that there was no constitutional compulsion to force the administration to buy additional fax machines to be able to receive petitioner's faxes. And the court's OPINION did further suggest that petitioner's suggestion was impertinent - when all petitioner wanted to do was to debunk Abel's exaggerated claim of the inconvenience it was to receive petitioner's faxes. Also relevant to these misrepresentations is Abel's repeated assertions [in his affidavit] of the frequent patient conversations he had with petitioner on his first-amendment rights when the facts are that he hardly ever spoke to petitioner on this subject in a conciliatory tone.

That is, Abel was almost always the martinet - giving orders and threatening petitioner with call-blocking if he did not do exactly as he was ordered. [This behavior, petitioner would argue, was also politically inspired.] Petitioner, in fact, recalls suggesting in his faxletters that Abel make the same accomodation with the petitioner that the latter has now made with 8 or the 9 municipalities in his school district to whom petitioner also sent multiple-addressed copies of his faxletters.

The accomodation called for petitioner to send just one copy of his faxletters with the understanding that the municipalities would xerox and forward copies of the letters to their original intended recipients [and maybe even a few more] - the same as if they had been individually fax-addressed addressed to them.

Abel would not hear of this or any other suggestion to reduce the number of the faxes the administration was receiving. I [petitioner] could not figure out why until I saw Abel's cited affidavit in which he had included copies of what [he said] were the logs of the administration's fax machine and which did purport to indicate the number of petitioner's transmissions in each of the first five months of 1994 - but which, on examination, were not those logs but simply typed compilations of who-knows-what. [Petitioner pointed this out in his Reply to respondents Motion For Summary Judgment. He pointed out, for example, that there were no indications in the purported logs of the length of each transmission or of the time and day on which they were sent.]

The purported logs did, however, explain why Abel did never really discuss how the number of petitioner's faxes might be reduced. The answer is that Abel was plotting [months before he call-blocked petitioner] to collect statistics that could be used to persuade a court that the number of these faxes was obviously(?) excessive.

BRIEF: PAGE 3, SECOND PARAGRAPH

This paragraph says:

> the district court concluded that since the message traffic on the machine had been confined to [] day-to-day business functions, the machine had not been "opened" as a "limited public forum". The court concluded, as a matter of law, that the fax machine should be considered a "non-public forum".

Petitioner's reaction is that the court erred here for failing to acknowledge his charges that respondents' 'statement of the case' was laced with numerous gross lies and misrepresentations [mainly taken from Abel's affidavit] and petitioner's subsequent argument that the lies and misrepresentations were probably planted to pre-dispose the court to view petitioner as a lout and the school administration as his victim.

Petitioner would argue, for example, that the court should not have assumed respondents' unargued claim that Giffler was the only one whose communications were not "official business" was true in the face of the 'summary judgment standard' which requires that the court accept as true the non-movant parties' versions of contested facts. Petitioner would further argue that the court made this errror [and others in which the court did horribly misconstrue the import of PERRY v. PERRY and DESTINATION VENTURES v. FCC] because respondents lying facts had pre-disposed the court to fault the petitioner's facts and arguments as to the precedents' correct interpretations.

BRIEF: PAGE 3, NEXT-TO-LAST PARAGRAPH

This paragraph says the district court did not find Abel's restriction [that petitioner not send a fax ON ANY SUBJECT to or via the administration's machine dur-

ing its business hours] did suppress his political views.

Petitioner's reaction is that that was not his complaint per se. That is, the complaint was rather that any restriction [illegally imposed] on petitioner's right to distribute his political views would infringe his first-amendment right to gather an audiience for those views.

Petitioner would also question the BRIEF's statement that the fact that Abel's mere pronouncement that 'all communications [except petitioner's] were 'official business' was not sufficient for the court to have concluded the fax machine had not been opened as a 'limited public forum'. [And, of course, petitioner will argue that the fax machine IS an obvious public forum so that to argue whether it had been opened as a limited public forum is immaterial.]

BRIEF IN OPPOSITION: PAGE 8, FIRST PARAGRAPH

Petitioner is skipping to Page 8 of respondents' BRIEF because he he has reached the maximum number pages to which this REPLY must be limited and because he should like to comment on respondents' comment [in their BRIEF] on Petitioner's comment that the district court miscounstrued the import of DESTINATION VENTURES v. FCC, namely that the cited case is not reviewable because it deals with first-amendment rights in commercial speech which is not at issue in subject litigation.

Petitioner's comment is that the case is relevant to a degree because the District Court did say it was relevant in that it involved an advertiser who sued the FCC for banning the transmission of unsolicted faxed advertisements and because that infringed the advertiser's first-amandment right of free speech. It is thus relevant in that the ban was not applied to non-commercial speech, and In that it did not dispute the advertiser's asserted

first-amendmeent right. The result is that there would be no such ban on this petitioner's transmissions if his phoneliness were NOT in PA.

We have thus a case in which The Third Circuit Court has set a precedent that is binding on fax transmissions whose origin and destinations are in PA but that is not binding when the sender [or blockee] is not in PA. We have, in short, a case in which the rulings of two circuit courts are in conflict.

C O N C L U S I O N

Petitioner respectfully requests for the reasons discussed above that this Court reject the proposition of respondents' subject Brief in Opposition.

Respectfully submitted,

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